[redacted]

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[redacted]

QUESTIONS PRESENTED

I. Does the First Amendment prevent a state from stripping political parties and their central committees of the right to endorse candidates in primary elections?

II. Does the first amendment right of freedom of association preclude a state from dictating the leadership and membership of a political party's central committee?

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No. 87-1269

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

MARCH FONG EU,
Secretary of State of the State of California, et al.,
Appellants,

vs.

SAN FRANCISCO COUNTY
DEMOCRATIC CENTRAL COMMITTEE, et al.,
Appellees.

On Appeal From The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR APPELLEES

STATEMENT OF THE CASE

This is an appeal from the entry of summary judgment invalidating various provisions of California's Elections Code on first and fourteenth amendment grounds.

Plaintiffs-Appellees ("plaintiffs") are seven county central committees of the California Democratic and Republican Parties and their chairs, the state central committee of the California Libertarian Party and its chair, and other organizations and individuals active in California politics.[1] These diverse organizations and individuals represent a wide range of political orientations. The members of this coalition are united in their beliefs (1) that political parties are an essential element of American

[1] All plaintiffs are named in the caption.

democracy and (2) that certain provisions of the California Elections Code deprive political parties and their members of the rights of political speech and association guaranteed by the First and Fourteenth Amendments. (II App. a-251 to a-254, First Amended Complaint, ¶¶ 26-34).[2]

Because of these beliefs, plaintiffs challenged the offending provisions of the Elections Code in an action filed in the United States District Court for the Northern District of California on November 17, 1983.[3] The first amended complaint alleged three causes of action, two of which are presented on this appeal.[4] The

[2] As used herein, "DC Item" identifies documents according to their District Court docket numbers; "CA [date]" identifies documents according to the date listed in the Court of Appeals' docket sheet; "I App." refers to Volume I of the Appendix to the Jurisdictional Statement; "II App." refers to Volume II of the Appendix to the Jurisdictional Statement; "Add." refers to the Addendum to Plaintiffs' Motion to Affirm or to Dismiss; "J.A." refers to the Joint Appendix; and "Op. Br." refers to Appellants' Opening Brief.

[3] A first amended complaint was filed on December 5, 1983. (II App. a-243). Defendants Eu, Van de Kamp, Smith, and Himmelsbach (collectively "appellants") answered on December 15, 1983. (DC Item 6). Separate answers were filed by defendants who have chosen not to join in this appeal. (*See* DC Items 7-8, 11-12).

[4] The District Court abstained on the second cause of action, which challenged state law restrictions on the right of political parties to endorse candidates in nonpartisan school, county, or municipal office elections, in light of the pendency in the California Supreme Court of an appeal presenting similar issues. The California Supreme Court ultimately decided that state law did not prohibit such endorsements. *Unger v. Superior Court*, 37 Cal. 3d 612, 692 P.2d 238, 209 Cal. Rptr. 474 (1984).

A ban on nonpartisan endorsements was subsequently enacted by ballot initiative in June 1986. This ban, in turn, is the subject of further litigation in the federal courts. As of this date, the initiative has been ruled unconstitutional under the First and Fourteenth Amendments to the United States Constitution by the Honorable Alfonso J. Zirpoli of the Northern District of California. (*See Geary v. Renne*, No. C 87 4724, Order Granting Partial Summary Judgment at 3-5 (N.D. Cal. April 27, 1988)).

first cause of action challenged California's prohibition of primary endorsements by party central committees. The third cause of action challenged the state's interference with the parties' internal affairs—including its determination of the composition of the state central committees and the terms of the party chairs.

I

THE SUMMARY JUDGMENT MOTIONS

On April 9, 1984, the District Court heard oral argument on cross-motions for summary judgment and a motion to dismiss filed by appellants. In support of the summary judgment motion granted below, plaintiffs filed 28 declarations from the then-chairs of each plaintiff central committee, prominent political scientists, and elected officials within and without California.[5] As discussed more fully below, plaintiffs' declarations detailed the extraordinary burdens the challenged statutes placed upon plaintiffs' first amendment rights.[6] In opposition to plaintiffs' summary

[5] Some of these declarations are reproduced in the Joint Appendix (at 79 to 129) and in the Addendum to Plaintiffs' Motion to Affirm or to Dismiss.

[6] *See infra* Parts I.A and I.B. Contrary to appellants' assertion that the challenged statutes reflect the policies of the parties (Op. Br. 34- 40), plaintiffs' declarations in support of summary judgment demonstrate that the parties are fundamentally opposed to Elections Code regulation prescribing the composition of their state central committees and prohibiting their ability to endorse candidates in primary elections. As the Court of Appeals found, these declarations establish that the plaintiffs "would reform the composition of their parties' central committees if the statutes were invalidated," and "would make primary endorsements if the practice were not prohibited." (I App. 23a). That finding is amply supported by the record below. (*See, e.g.*, Add. 2a-3a, 6a-7a, Christman Dec., ¶¶ 2-5, 13-15; Add. 11a, Coffey Dec., ¶ 4; Add. 37a-39a, 41a, King Dec., ¶¶ 2-6, 12; Add. 46a-48a, 51a, Post Dec., ¶¶ 2-6, 14; Add. 57a-59a, Romero Dec., ¶¶ 2-9).

Appellants misleadingly suggest that the District Court erred in failing to allow discovery into whether the Democratic and Republican Parties originally "caused" the enactment of the challenged Elections Code provisions. (Op. Br. 46 n.13). The Elections Code provisions

judgment motion and in support of their cross-motion for summary judgment, appellants submitted only one declaration—from former State Senator Albert Rodda—that purported to address the first amendment issues. (J.A. 60). As both the District Court and the Court of Appeals noted, Senator Rodda's declaration "consists of 'opinions . . . not based on facts, but on speculations.' " (I App. 43a; II App. a-55). The Rodda declaration failed to controvert plaintiffs' numerous declarations describing the impact of the challenged Elections Code provisions on political parties or to raise any genuine issue of material fact. (I App. 44a).

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challenged below were enacted, for the most part, in the early 1960s. *See, e.g.*, Cal. Stats. 1963 ch. 1108, p. 2574 (enacting predecessor to Cal. Elec. Code § 11702); Cal. Stats. 1961 ch. 23, p. 705 (enacting predecessor to Cal. Elec. Code §§ 8660, 9160); Cal. Stats. 1967 ch. 1651, pp. 3959-70 (enacting separate regulations for Democratic Party); Cal. Stats. 1967 ch. 1651, pp. 3970-82 (enacting separate regulations for Republican Party). Counsel's declaration under Rule 56(f) of the Federal Rules of Civil Procedure was limited to a request for discovery regarding plaintiffs' authority to bring suit and "written communications in the *past five years* . . . regarding the issues raised in this litigation." (II App. a-120 to a-121, Graybill Dec., Exh. A (emphasis added)). On its face, that request was not calculated to lead to the discovery of the historical position of California political parties with respect to the challenged Elections Code provisions.

In any case, the parties' original support for or opposition to the legislation is not at issue here. It is undisputed that the plaintiff party committees and party members currently oppose these legislative enactments.

To the extent that appellants sought discovery regarding plaintiffs' authority to bring suit, both the District Court and the Court of Appeals held that the authorization issue had been waived. (I App. 19a n.17; II App. a-75). Furthermore, plaintiffs submitted one or more declarations from the chair of each plaintiff central committee, copies of committee bylaws, and relevant excerpts of committee minutes, all attesting to authorization. *See* sources cited *infra*, notes 16 and 17. The District Court made an express finding, affirmed by the Court of Appeals, that "the plaintiff central committees and each of them have authorization and capacity to bring and maintain this litigation." (I App. 19a n.17; II App. a-76).

A. Statutes Banning Primary Endorsements

By their first cause of action, plaintiffs sought vindication of their right to endorse, support, or oppose candidates for nomination in direct party primary elections. (II App. a-255 to a-264). They were prohibited from doing so under California Elections Code section 11702, enacted in 1963, which provides that the "state convention, state central committee, and the county central committee in each county shall not endorse, support, or oppose, any candidate for nomination by that party for partisan office in the direct primary election." (II App. a-302). In addition to the statutory restriction on endorsements, Elections Code section 29430 makes it a misdemeanor for any person to "claim on . . . behalf [of a candidate for nomination of a political party for partisan office], that he or she is the official candidate or the officially endorsed candidate of such political party." (II App. a-303). As numerous commentators have pointed out, these restrictions on primary endorsements are unique to California.[7]

Plaintiffs' declarations demonstrated that, by prohibiting the issuance of primary endorsements by the parties, section 11702 has prevented the parties from educating the public regarding the candidates' positions and has engendered serious voter confusion. (*See* Add. 3a-4a, 5a, Christman Dec., ¶¶ 6, 9-10; Add. 38a, King Dec., ¶ 5; Add. 47a-48a, 49a-50a, Post Dec., ¶¶ 6, 9-10; Add. 57a-58a, Romero Dec., ¶ 4).

One of the major functions of political party organizations is to educate voters about candidates. (J.A. 124, Burns Dec., ¶ 10; J.A. 120, Bone Dec., ¶ 7; J.A. 101-02, Lee Dec., ¶ 11). The endorsement of the official party organization provides voters with valua-

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[7] Weisburd, *Candidate-Making and the Constitution: Constitutional Restraints on and Protections of Party Nominating Methods*, 57 S. Cal. L. Rev. 213, 271-72 n.343 (1984). Florida used to forbid such endorsements, but its statute was held to violate the First Amendment in *Abrams v. Reno*, 452 F. Supp. 1166, 1171-72 (S.D. Fla. 1978), *aff'd*, 649 F.2d 342 (5th Cir. 1981), *cert. denied*, 455 U.S. 1016 (1982). Eight states actually *require* parties to issue endorsements before the primary. Advisory Commission of Intergovernmental Relations, *The Transformation in American Politics: Implications for Federalism* 148 (1986).

ble information that is more dependable than the endorsement of any individual or single-issue group. (J.A. 125, Burns Dec., ¶ 12; J.A. 101-02, Lee Dec., ¶ 11). Voters often ask plaintiffs for the official party position in regard to primary candidates. (Add. 58a, Romero Dec., ¶ 5). Nevertheless, voters are not unduly influenced by such endorsements and continue to make independent choices. (J.A. 86, Fraser Dec., ¶ 10; J.A. 98, Jewell Dec., ¶ 17; Add. 12a, Coffey Dec., ¶ 6).[8]

According to the declarations of political leaders, voters want to know if a party endorses a candidate because such endorsements tell them whether a candidate adheres to the general positions of that party. Party endorsements also inform the electorate that an official political party organization, composed of well-informed, like-minded, and interested individuals, has evaluated the qualifications of a particular candidate and has found them to be superior. (J.A. 124, Burns Dec., ¶ 10). In this way, party endorsements serve as invaluable guides to voters who do not have the time or resources to get to know the candidates as well as the members of the official party organizations do. (*Id.*; J.A. 80, 81, Fay Dec., ¶¶ 3, 6; J.A. 106, Marchioro Dec., ¶ 5; DC Item 41, Layson Dec., ¶ 2).

The ban against primary endorsements has precluded the parties from recruiting or developing candidates for office, and has severely hindered their ability to attract talented and interested people. (J.A. 124, 125, Burns Dec., ¶¶ 9, 13; *see, e.g.*, Add. 10a-11a, Coffey Dec., ¶¶ 2-3; Add. 38a-39a, King Dec., ¶ 6; Add. 43a-44a, Supp. Layson Dec., ¶¶ 4-6). As a practical matter, the

[8] In a careful study of party gubernatorial endorsements in direct party primaries in five separate states, Political Science Professor Malcolm Jewell of the University of Kentucky found that these endorsements had no undue impact on voters. (J.A. 96-98, Jewell Dec., ¶¶ 10-17). His research clearly refutes the implication that party endorsees automatically win the primary. Mayor Edward Koch of New York, the 1982 Democratic gubernatorial endorsee in New York, lost the Democratic primary to Mario Cuomo, the second time in the last four primaries that the Democratic gubernatorial endorsee had lost. (J.A. 97, *id.*, ¶ 11). Gubernatorial endorsees in Massachusetts and Minnesota also lost their 1982 primary races. (J.A. 97, *id.*, ¶¶ 12-13).

parties are effectively prohibited from participating in the early phases of *any* particular candidacy. Plaintiffs' declarations establish that this limitation is particularly harmful when no candidate has entered the party primary; because the party is not free to recruit a candidate, voters are left without a meaningful choice in the general election. (Add. 3a-4a, Christman Dec., ¶ 6).

The voter confusion that has been created by prohibiting primary endorsements by official party organizations is illustrated by the 1980 campaign of Tom Metzger in the San Diego Democratic Congressional primary. Mr. Metzger won the primary election, and thus the Democratic nomination, even though he was a Grand Dragon of the Ku Klux Klan and stood for policies abhorrent to the Democratic Party and its members. (Add. 15a, Costantini Dec., ¶ 2). Section 11702 prevented the party from advocating the candidacy of a more representative Democrat, informing the voters of Mr. Metzger's radical ideology, or arguing to the electorate that his program and ideas should be rejected. (*Id.*)

The ban on primary endorsements also hinders the parties' attempts to promote party members' shared political beliefs. Deprived of the right to endorse and to speak out, the parties are left with no means by which to hold public officials accountable to party membership. (J.A. 85, Fraser Dec., ¶ 5; J.A. 92, Hudson Dec., ¶ 6). As a consequence of the parties' resulting weakness, wealthy individuals and special interest groups exert a disproportionate amount of influence and control over elected officials. (Add. 11a, Coffey Dec., ¶ 3).

Members of county central committees, including plaintiffs, associate together in order to advance shared political beliefs. (*See, e.g.*, Add. 50a, Post Dec., ¶ 12; Add. 40a, King Dec., ¶ 10; Add. 6a, Christman Dec., ¶ 12). They join the county central committees and state central committees intending to combine their efforts and to work together for common political purposes. (*See, e.g.*, DC Item 43, Mack Dec., ¶ 8). Political scientists agree that one of the political organizations' few effective tools to accomplish these goals is the right to comment on the qualifications of candidates. (J.A. 120, Bone Dec., ¶ 7; Add. 50a, Post Dec., ¶ 12). Yet, neither the county central committees nor the

state central committees can speak out on behalf of candidates in direct party primaries.

By preventing plaintiffs from participating in the process of choosing party nominees, a task this Court has recognized as "a basic function of a political party [in our system]," *Kusper v. Pontikes*, 414 U.S. 51, 58 (1973), the state has deprived the committees of their ability to perform their most important functions, thereby draining them of vitality and effectiveness. (Add. 3a, Christman Dec., ¶ 6; Add. 10a, Coffey Dec., ¶ 2; Add. 20a, Supp. Costantini Dec., ¶ 8; Add. 25a, Gingell Dec., ¶ 4; Add. 44a, Supp. Layson Dec., ¶ 7; J.A. 101-02, Lee Dec., ¶¶ 10-11; J.A. 125, Burns Dec., ¶ 13).

B. Statutes Prescribing the Membership and Leadership of the State Central Committees

By their third cause of action, plaintiffs sought the restoration of their right to structure and conduct internal political party affairs without intrusive and burdensome state interference. (II App. a-276 to a-282). Among other restrictions challenged in the third cause of action are Elections Code provisions governing the composition and method of selection of the state central committees, the length of the state central committee chairperson's term of office, and the requirement that the chair alternate between northern and southern California. (II App. a-277 to a-280). Violations of these provisions are subject to criminal prosecution. Cal. Elec. Code § 29102 (II App. a-303). Plaintiffs' declarations established that the statutes are contrary to rules they would have adopted absent legislative interference. Moreover, efforts to persuade the legislature to adopt rules responsive to the parties' perceived needs were unduly burdensome or unsuccessful.

Both the California Democratic[9] and Libertarian Parties have attempted unsuccessfully to obtain amendment of the challenged restrictions on internal party governance. (Add. 12a-13a, Coffey

[9] Although not a named plaintiff, the California Democratic Party has been on record since December 1984 as being fully supportive of all three causes of action and has indicated its intention to join the litigation at the earliest available opportunity. (Add. 30a, 32a-35a, Kelly Dec.,

Dec., ¶¶ 7-9; Add. 25a-26a, Gingell Dec., ¶¶ 5-6). In addition, all plaintiff county central committees, which include representative Democratic and Republican county central committees, are on record in opposition to the Elections Code provisions challenged in the third cause of action. (I App. 23a).[10]

For example, when the Libertarian Party became a "qualified party" under the Elections Code in 1980, entitled to participate in primary elections, it was forced to choose an organizational system already established for one of the other qualified parties.[11] (Add. 25a-26a, Gingell Dec.,[12] ¶ 5). Instead of organizing by regions, as it had done since its founding in 1972, the Libertarian Party was forced to organize by county. (*Id.*) The party had to "establish a totally new statewide organization that differed from [its] preferred and natural party structure." (*Id.*) The Libertarian Party tried unsuccessfully to persuade the state legislature to enact legislation specifically tailored to the party's organizational needs. In 1981, a bill that would have accomplished that goal was defeated in the Assembly Elections Committee. (Add. 26a, Gingell Dec., ¶ 6).

¶¶ 7-9 & Exh. A; Add. 64a-65a, Supp. Kelly Dec., ¶ 5; CA 1.18.85, Letter).

[10] The only evidence proffered by appellants below or cited in appellants' Jurisdictional Statement—the Rodda Declaration (II App. a-105)—is not to the contrary. That declaration does not address *unsuccessful* efforts to change Elections Code regulation of political parties, or the unique problems of the Libertarian Party, but merely states that when legislative changes in the "structure and procedures of the major political parties" have occurred, they were enacted "at the request and with the concurrence of the party affected." (II App. a-106, Rodda Dec., ¶ 6).

[11] The Libertarian Party must adhere to the rules governing the Peace and Freedom Party. (Add. 26a, Gingell Dec., ¶ 5).

[12] The version of Mary Gingell's declaration in support of summary judgment reprinted in the joint appendix at J.A. 87-89 leaves out a phrase in paragraph 6, thereby making the last sentence seem nonsensical.

Similarly, the Democratic Party has long been dissatisfied with the state-imposed method of selecting its state central committee. (Add. 12a, Coffey Dec., ¶ 7).

> The Party was dissatisfied because the vast majority of State Central Committee members were party nominees and their appointees, leaving only a few seats for the County Central Committees. Time after time, however, the Legislature had rebuffed any effort to reform this unrepresentative system.

(*Id.*) In 1979, twenty years after the Democratic Party began lobbying for change (*id.*), the legislature finally agreed to modify the statute, but "they did so only after a protracted, hard fought battle and even then substantially deviated from the Party's proposal." (*Id.*, ¶ 8). The rules, as amended, "still do not provide for adequate representation of the County Central Committees on the Democratic Party's central policy-making body." (Add. 12a-13a, id., ¶ 8).

The Republican Party has also suffered under Elections Code regulation of its internal structure. About three-fourths of the members of the Republican State Central Committee, under the Elections Code, are individual nominees for partisan office and their appointees. (J.A. 115-16, Sturrock Dec., ¶ 9). The county central committee chairs and their appointees are allotted the few remaining seats. (*Id.*) The minimal role of the county central committees under this state-imposed structure is disproportionate to their importance within the party. (*Id.*) Nominees, particularly losing nominees, come and go. In contrast, the county central committees are ongoing organizations composed of the elected representatives of the party membership. (*Id.*) By depriving the county central committees of any significant representation on the Republican State Central Committee, the state has effectively blocked grass roots and local party input into the central policy-making body of the California Republican Party.

The Elections Code limitation of state central committee chairs to a single two-year term weakens the parties even further. As the Court of Appeals recognized, such restrictions burden the parties' first amendment rights by "impair[ing] the parties' ability to

commit their fortunes to experienced and successful leadership." (I App. 33a).

Plaintiffs' declarations demonstrated that when the state interferes in a party's internal affairs, "it impairs the ability of the party to function and hampers its ability to serve the needs of party members." (J.A. 86, Fraser Dec., ¶ 11; *see also* J.A. 125, Burns Dec., ¶ 14). The state is frequently unable to anticipate and provide for a party's particular needs. (J.A. 120, Bone Dec., ¶ 8). Indeed, as the Court of Appeals found, "the parties have become weak and fossilized" (II App. a-32) because the state requires them to follow rigid, statutorily-prescribed bylaws that are often contrary to their best interests and their chosen mode of internal governance. (Add. 15a-16a, Costantini Dec., ¶ 3; Add. 25a-26a, Gingell Dec., ¶¶ 5-6).

II
THE PROCEEDINGS BELOW

On April 16, 1984, the District Court granted summary judgment for plaintiffs as to the first cause of action and those portions of the third cause of action involving Elections Code regulation of the selection of state central committee members and the selection and terms of state central committee chairs.[13] The court denied appellants' cross-motion for summary judgment on those causes of action and their motion to dismiss the action on Article III grounds.[14] The District Court found that the bar against

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[13] The District Court granted plaintiffs' motion as to California Elections Code sections 8660, 8661, 8663-8665, 8667, 8669, 9160, 9160.5, 9161, 9161.5, 9162, 9163, and 9164, relating to the selection of state central committee members; sections 9274 and 9816, relating to the terms of the state central committee chairs; section 11702, restricting endorsements in partisan primary elections; and sections 29102 and 29430, imposing criminal sanctions for violations of these provisions. (II App. a-68 to a-70).

[14] Appellants sought to dismiss this action on the ground, *inter alia*, that there was no case or controversy, and they continue to assert that "the first amended complaint did not and could not properly allege defendants had threatened to enforce the challenged statutes against any

primary endorsements substantially burdened plaintiffs' rights to

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plaintiff." (Op. Br. 12). However, appellants have been unwilling or unable to give plaintiffs assurances to that effect. At the hearing on the motion for summary judgment, Judge Patel specifically inquired into the likelihood of enforcement of section 11702:

> The Court: Let me ask you about violation of 11702. The Central Committee of the city and county of San Francisco decides that there is a particular candidate they want to endorse in the direct primary, and despite the law to the contrary, based upon your assurances, of course, that they are not going to be prosecuted, they go ahead and endorse this candidate and let it be known through various kinds of brochures, communiques, whatever, that this particular candidate is being endorsed.
>
> And you are approached by a very vociferous opposing candidate, who is very unhappy about this, because they violated the law. You are not going to enforce that provision against the Central Committee? I guess what you are saying is that you are not going to bring an action to enjoin them or seek any permanent penalties against them?
>
> Mr. Graybill: Your Honor, pursuant to the Eleventh Amendment, the only thing that we are answerable for—
>
> The Court: I want an answer to my question.
>
> Mr. Graybill: The answer that I can give you is that we have not done so in the past. We do not view there being any criminal provisions involved here. Our attitude has been that it is primarily a statute protecting the rights of the individual party members that is available there. Without those provisions the party members themselves would not have a hook.
>
> The Court: That does not answer my question. Are you prepared to tell those members of San Francisco County Democratic Committee that if they endorse candidate X in the primary, and candidate Y comes and complains to you, that you are not going to seek to enjoin them from violation of the law?
>
> Mr. Graybill: You are asking a hypothetical question that I can't really answer. All I can do is point out to you what the history of our involvement is, what our attitude has been.

(J.A. 46-47). The court concluded that there was "no evidence before the court that defendants would not use their power to civilly enforce the

freedom of speech and freedom of association. The court stated: "There is no greater burden on the freedom of speech than an outright governmental prohibition of any kind of expression by the target group on a particular topic, as is the case here." (II App. a-54). After finding that the state had failed either to meet the "rational basis" test or to "adduce any interest even approaching a 'compelling' one" (II App. a-55), the District Court held that sections 11702 and 29430 of the California Elections Code violate the First Amendment of the United States Constitution and 42 U.S.C. section 1983. (II App. a-68).

The District Court also found that plaintiffs had demonstrated the substantial burden on their right to freedom of association insofar as the state regulated the selection of the members and the terms of the chairs of the state central committees. (II App. a-59). The court noted that the term of office of the chairpersons is "of a piece with the membership selection process itself" (*id.*), and held that "a party's selection of its governing bodies is protected by the First Amendment right of association." (II App. a-61). Finding that appellants had, once again, "failed to show anything approaching a compelling state interest in these restrictions" (*id.*), the District Court struck them down as violative of the First Amendment and 42 U.S.C. section 1983. (II App. a-69 to a-70).

On April 16, 1984, appellants filed their Notice of Appeal with the District Court and an Emergency Motion for Stay of Judgment with the Court of Appeals. (DC Item 85; CA 4.16.84). In their motion for a stay, appellants complained that the District Court had not made an explicit finding that the central committees had authorized participation in the lawsuit. The Court of Appeals remanded the action to the District Court for its findings on the matter. (CA 5.25.84).

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challenged provisions in the event of a violation." (II App. a-48 to a-49). Moreover, the court found that "[t]he declarations submitted by plaintiffs make clear that plaintiffs have refrained from exercising rights purported to be protected by the First Amendment, due to the existence of these statutes." (II App. a-49).

Although the District Court determined that "defendants are properly deemed to have waived the issue," having failed to raise it by specific negative averment (II App. a-75) or on summary judgment (II App. a-75 to a-76), the court nevertheless considered the merits of appellants' putative challenge. The court had before it the "uncontroverted declarations under penalty of perjury from each of the eight central committee plaintiffs stating authorization has been given and the method[15] by which it was given."[16] (II App. a-76 (footnote added)). The case was then

[15] For example, when the lawsuit was filed on November 17, 1983, committee chair Dolph Andrews had consulted with other members of the San Francisco County Republican Central Committee, had determined it to be desirable for the committee to join, and had authorized the committee's participation as to the second and third causes of action. (DC Item 69, Andrews Dec., ¶¶ 2-3). However, the members of the committee had not yet discussed participation in the lawsuit during a regular meeting. (DC Item 101, Exh. 18, Faulkner Dec., ¶ 3). On September 6, 1984, after the validity of this authorization was questioned, the full county central committee voted 18-6 to ratify the authorization and to continue participation in the lawsuit's second and third causes of action. (CA 10.16.84, Supp. Andrews Dec., ¶ 7; CA 10.16.84, Bacci Dec., Exh. 1).

Appellants misleadingly characterize the 1984 ratification of the 1983 authorization as an acknowledgement "that [the committee] had not previously authorized participation in this litigation." (Op. Br. 31). The real import of the committee's action was to reaffirm the committee's support for the lawsuit and its continued participation as a plaintiff in the second and third causes of action.

[16] Each of the plaintiff committees authorized participation in the lawsuit: the Alameda County Democratic Central Committee (DC Item 88, King Dec., ¶ 3; DC Item 101, Exh. 7, Minutes); the Los Angeles County Democratic Central Committee (DC Item 74, Wallace Dec., ¶ 3); the Placer County Democratic Central Committee (DC Item 89, Romero Dec., ¶ 3; DC Item 101, Exhs. 13, 14, 15, Minutes); the San Francisco County Democratic Central Committee (DC Item 72, Post Dec., ¶ 3; DC Item 101, Exhs. 2, 3, 4, Minutes); the San Francisco County Republican Central Committee (CA 10.16.84, Supp. Andrews Dec., ¶ 7; CA 10.16.84, Bacci Dec., Exh. 1); the Santa Clara County Democratic Central Committee (DC Item 71, Mack Dec., ¶ 3; DC Item 101, Exhs. 9, 10, Minutes); the Solano County Democratic Central Committee (DC Item 73, Rockwood Dec., ¶ 3); and the State Central Committee of the Libertarian Party of California (DC Item 70, Gingell Dec., ¶ 3; DC Item 101, Exh. 17, Minutes).

transferred back to the Court of Appeals, and the authorization issue was briefed there.[17] (CA 6.29.84, Appellants' Brief; CA 7.9.84, Plaintiffs' Memorandum). The Court of Appeals held that there was "no reason to disturb [the District Court's] rulings on appeal." (I App. 19a n.17).

[17] There is, contrary to appellants' insinuations, no genuine factual issue as to the committees' authorization of participation in this lawsuit. Appellants argue that the meeting minutes submitted by plaintiffs indicate that some committees did not authorize participation as to all of the causes of action that they joined. (Op. Br. 6, 31). Appellants claim that references in the minutes to "the lawsuit to allow parties to endorse in non-partisan elections" indicate that the Libertarian State Central Committee authorized participation in the second cause of action alone. (Op. Br. 6).

Appellants are mistaken. According to the sworn declaration of the Libertarian State Committee's chair, Mary Gingell, "[t]he resolution that was passed at the November 21, 1982 meeting . . . did not limit, and was not intended to limit, [the committee's] authorization to only the challenge against the statutes prohibiting endorsements in nonpartisan elections." (DC Item 119, Supp. Gingell Dec., ¶ 5). The phrase "the lawsuit to allow parties to endorse in non-partisan elections" was used in the minutes as an easy means to identify the lawsuit. (*Id.*, ¶ 6).

Toward the end of their Statement of the Case, appellants assert more generally that plaintiffs' exhibits "raised serious doubt that several purported central committees" had properly authorized participation. (Op. Br. 31). Appellants do not elaborate, nor do they proffer any support for this contention. Tellingly, appellants do not mention the supplemental declarations submitted by the chairs of the committees as to which these accusations were made during the proceedings below. (*See* DC Item 121, Supp. King Dec., ¶ 6 (the Alameda County Democratic Central Committee "properly authorized its participation in all three causes of action of this lawsuit"); DC Item 120, Supp. Romero Dec., ¶¶ 6-7 (the Placer County Democratic Central Committee authorized participation in the first and third causes of action, using the phrase "a suit which would end the restriction on primary endorsements" in the minutes as "an abbreviated method of identifying this lawsuit")).

The merits of the case were fully briefed six times in the Court of Appeals—first, on appellants' emergency motion for a stay of judgment pending appeal (CA 4.16.84, Motion for Stay; CA 4.18.84, Opposition), which was granted on April 24, 1984 (CA 4.24.84); second, immediately prior to oral argument, which was held on May 15, 1984 (CA 5.8.84, Appellants' Brief; CA 5.8.84, Plaintiffs' Brief); third, pursuant to the Court of Appeals' Order dated August 5, 1985, requesting supplemental briefs on the first amendment issues presented on appeal (CA 10.9.85, Appellants' Brief; CA 11.5.85, Plaintiffs' Brief; CA 11.18.85, Appellants' Reply Brief); fourth, following remand from this Court for reconsideration in light of *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 107 S. Ct. 544 (1986) (CA 3.12.87, Plaintiffs' Brief; CA 3.30.87, Appellants' Brief; CA 4.6.87, Plaintiffs' Reply Brief); fifth, on appellants' motion for rehearing and suggestion for rehearing *en banc* of the Court of Appeals' August 18, 1987 opinion reaffirming the entry of summary judgment (CA 9.15.87, Petition for Rehearing); [18] and sixth, on appellants' motion to stay issuance of mandate pending disposition of this appeal (CA 11.5.87, Motion for Stay of Mandate; CA 11.17.87, Opposition). The record on summary judgment has twice been subjected to probing review *de novo* by the Court of Appeals in the course of that process. [19]

The Court of Appeals found that the challenged statutes "attach[ed] unconstitutional conditions to a party's right of access to the ballot." (I App. 20a). It rejected appellants' "astonishing argument" that legislative action can be equated

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[18] The petition for rehearing was unanimously denied on October 29, 1987. The full court was advised of appellants' suggestion for rehearing *en banc*, and no judge requested a vote on the suggestion for rehearing *en banc*. (I App. 5a).

[19] On June 18, 1986, the Court of Appeals issued its first decision in favor of plaintiffs. On January 12, 1987, this Court remanded the case to the Court of Appeals for reconsideration in light of *Tashjian v. Republican Party of Connecticut*. Having considered the matter further after supplemental briefing, the Court of Appeals concluded that *Tashjian* supported its original decision and, on August 18, 1987, issued a second decision, which is the subject of this appeal.

with voluntary action by the parties, stating: "The exercise of the coercive power of the state is the antithesis of voluntary action by political associations." (*Id.*, 21a-22a). The court recognized the risk that state regulation of parties' internal affairs "will favor some parties and some party factions over others." (*Id.*, 40a). It held that the state's interest in orderly general elections does not give it the power to unnecessarily regulate parties' internal affairs or "preempt party decision-making in order to protect political parties from the disruption inherent in deciding matters for themselves." (*Id.*, 40a-42a).

With respect to the ban on endorsements, the Court of Appeals stated that "[p]rohibiting the governing body of a political party from supporting some candidates and opposing others patently infringes both the right of the party to express itself freely and the right of party members to an unrestricted flow of political information." (*Id.*, 50a (citing *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 475 U.S. 1, 8 (1986))). It also found that appellants' asserted state interests were "a form of paternalism that is inconsistent with the First Amendment." (*Id.*, 52a). Accordingly, the Court of Appeals concluded that the challenged Elections Code provisions substantially burden plaintiffs' first amendment rights and that appellants had failed to show a compelling state interest in defense of the challenged statutes. (*Id.*, 49a-52a).

Following the Court of Appeals' denial on November 17, 1987 of appellants' motion to stay mandate (*id.*, 61a), Justice O'Connor denied appellants' application to stay issuance of mandate pending this appeal. Mandate issued on December 1, 1987. (CA 11.25.87).

III

SUBSEQUENT DEVELOPMENTS

Following this Court's denial of appellants' motion to stay mandate, the California Democratic Party adopted a final set of endorsement procedures for the June 1988 primary elections. (Add. 93a-95a, Kelly Dec., ¶¶ 3-8). On February 20-21, 1988, pursuant to these procedures, the Democratic Party held 16

regional pre-endorsing conferences around the state in which county central committee members evaluated Democratic candidates running for local partisan offices such as United States Congress, State Senate, and State Assembly. (Add. 95a, Kelly Dec., ¶ 9). The Democratic Party, at its March 18-20, 1988 annual convention, issued final endorsements in over 125 separate Democratic primary contests for the offices of United States Senate, United States Congress, State Assembly, and State Senate. (*Id.*, ¶ 10). The ability to endorse primary candidates has revitalized the Democratic Party by, among other things, rekindling grass roots interest in party activities. (Add. 96a, *id.*, ¶ 12). Moreover, as anticipated, the party has considered and adopted amendments to its bylaws affecting the party's internal structure in accordance with the recommendations of its Rules Committee. (*See id.*, ¶ 13).

The California Libertarian Party similarly exercised its right of endorsement at its annual convention, held on February 12-15, 1988. (Add. 91a, Hinkle Dec., ¶ 5).

The California Republican Party has also exercised its first amendment rights. At its annual convention, held February 19-21, 1988, the Republican Party amended its bylaws to reform the composition of its state central committee. (Add. 74a, Bell Dec., ¶ 9). The Republican Party's general counsel points out that the recently adopted rules reflect the Republican Party's policy decision as to what is in its best interests at the present time, and should not be construed to mean that the party desires the kind of government regulation mandated by the Elections Code provisions invalidated below. (Add. 74a, Bell Dec., ¶ 8).

SUMMARY OF ARGUMENT

Plaintiffs are political organizations and politically active individuals who brought this action to vindicate their first amendment rights of freedom of speech and freedom of association. The First Amendment protects plaintiffs' rights to speak freely on political issues and to band together for the advancement of their shared political views. In violation of these constitutional guarantees, California has stripped plaintiffs of the right to endorse candidates

in their parties' primaries and has unduly interfered with the parties' internal structures and operations.

Section 11702 of California's Elections Code prohibits plaintiff central committees from endorsing, supporting, or opposing primary candidates. Section 29430 makes it a criminal offense for any person to claim that a party endorses a particular candidate in its primary. These statutes substantially burden plaintiffs' rights of free speech and association by denying them the right to speak as a group on the qualifications of political candidates. Before the District Court, plaintiffs demonstrated without contradiction that this absolute deprivation of the right to speak also has consequential effects that further burden plaintiffs' rights and inhibit their ability to function effectively as political organizations. Plaintiffs are unable to participate in the selection process for their parties' candidates; they are unable to play any role in holding elected officials accountable to their constituents; and they are unable to recruit qualified candidates and talented leaders for their parties.

Appellants advanced no compelling state interest that justifies the burdens that sections 11702 and 29430 place on plaintiffs' exercise of their first amendment rights. The state's interest in orderly general elections is not affected by primary endorsements, and the state has no legitimate interest in preventing intraparty disputes that do not affect the general elections. Uncontroverted facts show that the state's interest in preventing voter confusion is frustrated rather than advanced by the ban on primary endorsements. Moreover, appellants offer no justification for the criminal sanctions embodied in section 29430. Accordingly, the Court of Appeals correctly determined that sections 11702 and 29430 are unconstitutional, and its holding should be affirmed.

Plaintiffs also challenged Elections Code provisions that prescribe the compositions of the parties' state central committees and limit party chairs to a single, nonrenewable term. These provisions substantially burden plaintiffs' right to determine "the structure which best allows [them] to pursue [their] political goals." *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 107 S. Ct. 544, 554 (1986). It was uncontradicted below that the Democratic and Republican Parties are saddled with unrepre-

sentative state central committees whose membership is skewed in favor of incumbent officeholders. Moreover, plaintiffs are unable to adjust their bylaws in response to the changing needs and views of their parties and party leaders. Changes in state central committee bylaws require legislative action that more often than not is neither successful nor responsive to the parties' needs. The limit on the state party chairs' terms of office deprives parties of the opportunity to make effective use of experienced leaders.

Appellants, again, failed to show that the state has a compelling interest that justifies its pervasive interference in the parties' internal affairs. This Court has never recognized a state interest in party unification or in a political party's internal governance. The state has no interest that justifies its usurpation of the parties' right to choose "the structure which best allows [them] to pursue [their] political goals." *Id.* Nor is there any justification for the imposition of criminal sanctions for the parties' exercise of this constitutionally protected choice. Accordingly, the Court of Appeals correctly found that the challenged statutes are unconstitutional, based on the uncontroverted facts established below. Its decision should be affirmed by this Court.

ARGUMENT

The first amendment rights of free speech and association are among our most jealously guarded personal freedoms. As Justice Brandeis explained:

> Those who won our independence believed that . . . freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; . . . that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.

Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis and Holmes, J.J., concurring) (footnote omitted).

Because we are a self-governing people, "[a] State's claim that it is enhancing the ability of its citizenry to make wise decisions by restricting the flow of information to them must be viewed with some skepticism." *Tashjian*, 107 S. Ct. at 552 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 798 (1983)). As explained by Professor Meiklejohn, "[w]hen men govern themselves, it is they—and no one else—who must pass judgment upon unwisdom and unfairness and danger."[20] Consequently, "the people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments." *Meyer v. Grant*, 108 S. Ct. 1886, 1894 n.7 (1988) (quoting *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 791 (1978)). This Court has recognized that "speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964). The very legitimacy of our democratic system of self-government derives from the "unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484 (1957).

Hence, the speech banned by section 11702 of the California Elections Code, political speech, occupies the "highest rung of the hierarchy of First Amendment values," and is entitled to special protection. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982); *Carey v. Brown*, 447 U.S. 455, 467 (1980). Prohibiting political parties from issuing primary endorsements is fundamentally inconsistent with our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

Government regulation of political speech and political parties is particularly suspect for the related reason that those drafting the regulations will have a stake in maintaining their own political power. As explained by Professor Scanlon,[21]

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[20] A. Meiklejohn, *Political Freedom: The Constitutional Powers of the People* 27 (1948).

[21] Scanlon, *Freedom of Expression and Categories of Expression*, 40 U. Pitt. L. Rev. 519, 534 (1979).

> [W]here political issues are involved governments are notoriously partisan and unreliable. Therefore, giving government the authority to make policy by balancing interests in such cases presents a serious threat to particularly important participant and audience interests.

California's exercise of control over the composition and leadership of the political parties' governing bodies is particularly suspect because it gives elected officials unprecedented control over the means by which they are elected. California turns the partisan political system on its head when it insists that the voluntary organizations through which the citizens control the government be regarded as creatures of the state.

Such regulation interferes with the constitutionally protected right to freedom of association—the "most natural privilege of man, next to the right of acting for himself, . . . of combining his exertions with those of his fellow creatures and of acting in common with them."[22] Association for the advancement of political goals falls squarely within that constitutional protection. "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." *Tashjian*, 107 S. Ct. at 548 (quoting *NAACP v. Alabama*, 357 U.S. 449, 460 (1958)).

The freedom of political association protected by the Constitution confers expressive rights directly onto political organizations. Because "[e]xercise of these basic [first amendment] freedoms . . . has traditionally been through the media of political associations," *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957), political parties as well as individual party adherents enjoy the rights of political expression and political association. To impose limitations "on individuals wishing to band together to advance their views . . . , while placing none on individuals acting alone, is clearly a restraint on the right of association." *Citizens Against*

[22] 1 A. de Tocqueville, *Democracy in America* 196 (P. Bradley, ed. 1945).

Rent Control/Coalition for Fair Housing v. City of Berkeley, 454 U.S. 290, 296 (1981). Hence, California abridges plaintiffs' *associational freedoms* by forbidding central committees from issuing endorsements.

The freedom of political association imposes other distinct limits on the regulatory power of the state. Most obviously, it prevents the state from imposing barriers to individuals' formation of political organizations. *See, e.g., NAACP v. Button*, 371 U.S. 415, 430 (1963); *Bates v. Little Rock*, 361 U.S. 516, 522-23 (1960). It also limits the state's ability to regulate the internal affairs of political organizations. *See, e.g., Tashjian*, 107 S. Ct. at 548-49; *Democratic Party of United States v. Wisconsin*, 450 U.S. 107 (1981); *Cousins v. Wigoda*, 419 U.S. 477 (1975). In utter disregard of this constitutional principle, California has enacted sets of detailed regulations governing each specific political party, dictating matters as fundamental as who shall govern the party.

This case presents constitutional questions of utmost importance to the self-governing citizens in our democracy. California attempts to control "the essence of self-government" by regulating the flow of information to its citizens and by seizing control of their political parties. Appellants cannot controvert plaintiffs' factual showing that the challenged statutes burden plaintiffs' rights to political speech and political association, nor can they advance any state interests to justify those burdens. California's regulations are fundamentally inconsistent with the First and Fourteenth Amendments. Therefore, plaintiffs urge this Court to affirm the decision below.

I

CALIFORNIA'S BAN ON PRIMARY ENDORSEMENTS VIOLATES PLAINTIFFS' FIRST AMENDMENT RIGHTS OF FREE SPEECH AND ASSOCIATION

A. The Ban on Primary Endorsements Deprives Political Parties of Their First Amendment Rights

The First Amendment clearly protects plaintiffs' right to express opinions about political candidates. "Whatever differences

may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates." *Mills v. Alabama*, 384 U.S. 214, 218 (1966). "[T]he constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office." *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971). Nevertheless, California enacted Elections Code sections 11702 and 29430, depriving plaintiff central committees of their right to endorse primary candidates.

California has not always denied plaintiff central committees this constitutional right to comment upon the qualifications of primary candidates. Plaintiff central committees could legally exercise their right to endorse, support, and oppose candidates in party primary elections until 1963, when the California legislature enacted the predecessor to section 11702 of the Elections Code. Cal. Stats. 1963 ch. 1108, p. 2574. The new statute provided, in sweeping terms, that the "state convention, state central committee, and the county central committee in each county shall not endorse, support, or oppose, any candidate for nomination by that party for partisan office in the direct primary election." Plaintiff central committees were thereby excluded from the process of choosing party nominees, "a basic function of a political party" in our system. *Kusper v. Pontikes*, 414 U.S. 51, 58 (1973).

1. Sections 11702 and 29430 Unequivocally Abridge Political Speech

It cannot seriously be disputed that a complete deprivation of the right to speak on a political issue substantially burdens plaintiffs' right of free speech. "A ban on specific group voices on public affairs violates the most basic guarantee of the First Amendment—that citizens, not the government, control the content of public discussion." *Roberts v. United States Jaycees*, 468 U.S. 609, 634 (1984) (O'Connor, J., concurring). The restrictions on plaintiffs' right of political expression in this case are far greater than those condemned in *Buckley v. Valeo*, 424 U.S. 1 (1976). In *Buckley*, this Court struck down a statute that restricted various groups, including certain political parties, from

spending more than $1,000 in advocating the election of a candidate. 424 U.S. at 39. This Court found the statute unconstitutional even though the restricted groups were allowed to state their views and spend $1,000 in support of their candidate. Plaintiff central committees, in contrast, can spend nothing and say nothing, and are threatened with criminal prosecution.[23] Unlike the plaintiffs in *Buckley*, plaintiffs herein cannot give voice to their political opinions. Sections 11702 and 29430 thus impose a far more substantial burden on precious first amendment rights than did the statute declared unconstitutional in *Buckley*. Their infringement of plaintiffs' first amendment rights is unequivocal and absolute.

For the central committee plaintiffs, this infringement has had particularly devastating consequences. The issuance of an endorsement is one of the few tools a party has to hold an incumbent accountable to the constituent party members. (J.A. 110-11, Ranney Dec., ¶ 9; J.A. 120, Bone Dec., ¶ 7). Party organizations monitor the elected officials and can use their endorsement power to ensure that officials address the needs of voters and party members.[24] (J.A. 85, Fraser Dec., ¶ 5). A consequence of depriving parties of the right to endorse is that elected officials become answerable primarily to wealthy individuals and special interest groups that have the financial power to affect a candidate's

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[23] Appellants' argument, rejected by the courts below, that there is no threat here of criminal prosecution (I App. 16a-18a; II App. a-45 to a-50) suggests that appellants would concede that criminal sanctions are inappropriate. In any event, appellants have not offered any justification for the imposition of such sanctions in this context.

[24] Contrary to appellants' assertion that the central committees' primary function is "to conduct their party's campaign in the general election" (Op. Br. 7), the Elections Code anticipates a broader role for central committees, providing that each county central committee shall perform any "duties and services for [its] political party as seem to be for the benefit of the party." Cal. Elec. Code §§ 8942, 9443. Central committees debate and take positions on various community issues, form coherent platforms after internal debate, and publicly support and oppose local and state ballot propositions. (*See, e.g.*, Add. 53a-54a, Supp. Post Dec., ¶¶ 3, 6; Add. 57a, Romero Dec., ¶ 3).

prospects for election. (Add. 11a, Coffey Dec., ¶ 3). Political party organizations are thereby drained of political power, as well as being silenced on a matter of surpassing importance and indisputable public concern.

Because they are deprived of the right to endorse primary candidates, plaintiff central committees are also unable to recruit capable candidates who will further the parties' goals. Only political parties have the breadth, scope, and ability consistently to find and persuade qualified individuals to run for the thousands of offices up for election each year. (J.A. 124, Burns Dec., ¶ 9). Yet, without the right to endorse and support potential recruits, the central committees have been hindered in attracting talented people to their organizations. (Add. 10a, Coffey Dec., ¶ 3).

2. Political Parties Cannot and Do Not Acquiesce in the State's Abrogation of Plaintiffs' Right to Endorse Primary Candidates

Appellants argue that "if a state statute does not conflict with the policies of a political party, the statute does not substantially infringe on the [first amendment] rights of its members and organizational manifestations . . . ." (Op. Br. 34 (citing *Marchioro v. Chaney*, 442 U.S. 191 (1979))).

This argument is astounding in light of the record below, which clearly establishes that the Democratic and Libertarian Parties oppose the statutes at issue.[25] By way of uncontradicted declarations, plaintiffs demonstrated that were it not for the challenged statutes, county central committees would have endorsed candidates in their parties' primary elections.[26] Successive chairs of plaintiff Libertarian State Central Committee have filed declara-

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[25] Of course, whether or not the parties supported the legislation at some time in the past is utterly irrelevant. *See Tashjian*, 107 S. Ct. at 547 (Republican Party successfully challenged statute it had fought to uphold ten years earlier).

[26] *See* Add. 37a, King Dec., ¶ 2 (Alameda County Democratic Central Committee); Add. 57a, Romero Dec., ¶ 2 (Placer County Democratic Central Committee); Add. 47a, Post Dec., ¶ 4 (San Francisco County Democratic Central Committee).

tions evidencing that party's unequivocal support of this lawsuit. (*See* Add. 24a-26a, Gingell Dec.; CA 11.5.85, Dean Dec.; Add. 62a, Hinkle Dec., ¶ 2). The Democratic State Central Committee, although it did not join this lawsuit prior to its filing, has resolved to join as soon as is feasible and has stated that it "enthusiastically supports this lawsuit in all of its causes of action, affirms its principles and goals, and wishes to assist in its prosecution." (Add. 34a, Kelly Dec., Exh. A). Both these state central committees, following denial of appellants' motion for stay of mandate, have followed through and issued endorsements of primary candidates. At the Libertarian Party's annual convention, in February of 1988, the party endorsed the candidacy of Mr. Jack Dean, who was running in the June 1988 Libertarian Party primary for the office of United States Senator. (*See* Add. 91a, Hinkle Dec., ¶ 5). At its March 1988 annual convention, the Democratic Party endorsed over 125 primary candidates for partisan office. (Add. 95a, Kelly Dec., ¶ 10).

Appellants also fail to recognize that plaintiff county central committees are independent and distinct political entities. *See* Cal. Elec. Code §§ 8820-8945, 9320-9510. Their members are separately elected, and they adopt their own bylaws, hire their own staffs, independently raise funds, and have the capacity to sue or be sued. (Add. 54a, Supp. Post Dec., ¶ 5). Plaintiffs, as separate entities and individuals, were specifically forbidden by section 11702 to endorse or oppose primary candidates on behalf of their political associations. Section 29430 subjects plaintiffs to criminal penalties if they claim that their party endorses a particular candidate for the primary election. Plaintiff county central committees brought this action to vindicate *their own* first amendment rights.

Legislative abrogations of county central committees' first amendment rights are unconstitutional even if one makes the unsupportable assumption that every other party member and entity, including the state central committees, supports the ban on endorsements. The right of free speech is preserved for each and every plaintiff by the First Amendment and can be neither "bestowed" on plaintiffs by their parties (*see* Op. Br. 15), nor waived by the parties on plaintiffs' behalves. A majority cannot

waive the first amendment rights of a minority. *See generally Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981).

In *Citizens Against Rent Control*, a majority of Berkeley voters had passed an initiative restricting campaign contributions. This Court found the initiative unconstitutional because it deprived plaintiffs of their first amendment right to support or oppose ballot measures. 454 U.S. at 299-300. Even though the majority of voters did not wish to exercise their first amendment rights, this Court found that they could not unilaterally remove those rights from the minority who wished to express themselves. This Court noted that it was irrelevant that the "voters rather than a legislative body enacted [the initiative], because the voters may no more violate the Constitution by enacting a ballot measure than a legislative body may do so by enacting legislation." *Id.* at 295. *See also United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938). Just as voters cannot validate unconstitutional legislation through the initiative process, the political parties cannot validate unconstitutional legislation by acquiescing to it. Whatever position a particular political party may take on endorsements at any given time, the first amendment rights of plaintiff county central committees and individuals cannot be waived by their parties' policies nor taken away by the state.

Appellants' reliance on *Marchioro* is misplaced. That case does not stand for the proposition that plaintiffs' constitutional rights can be waived at the whim of the party. (*See* Op. Br. 34). Rather, it holds that if a challenged statute is not the source of the burden on plaintiffs' rights, the statute is not unconstitutional. In *Marchioro*, the challenged interference with internal party affairs was not mandated by statute, but was, instead, created by a voluntary delegation of authority by the party to a statutorily-created committee. This Court held, therefore, that "[t]here can be no complaint that the party's right to govern itself has been substantially burdened by statute when the source of the complaint is the

party's own decision to confer critical authority on the State Committee." *Marchioro*, 442 U.S. at 199.[27]

The relevant inquiry, in ascertaining whether there has been a "substantial infringement" under *Marchioro*, is not whether the Elections Code is consistent with present party policy, but whether it is in fact the source of the burden on plaintiffs' rights. Here it is obvious that section 11702 is the source of the burden on plaintiffs' right to endorse primary candidates. Unlike the statute in *Marchioro*, the statutes challenged here mandate the interference with free speech. Consequently, those statutes impose a substantial and unconstitutional burden on plaintiffs' first amendment rights.

3. The State Cannot Condition Ballot Access on the Sacrifice of First Amendment Rights

Appellants argue that as a price for participating in the state's primary system, the parties willingly subject themselves to the challenged regulations. (Op. Br. 41). Parties that are not ballot-qualified[28] are purportedly provided "with other means of placing their candidates on the general election ballot although the candidates' party affiliations do not appear on the ballot." (*Id.*) Appellants also offer parties the "choice" of "qualifying" their candidates as write-ins. (Op. Br. 25, 49). In other words, appellants would have parties choose among (1) remaining silent during the primary campaign, (2) being silenced as to their affiliation with a candidate on the general election ballot, and (3) having their candidate omitted from the ballot. Each "choice" impermissibly burdens plaintiffs' first amendment rights.

This Court has already considered and rejected the argument that first amendment rights are not infringed by burdens on one

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[27] The state convention subsequently established an independent party committee, composed as the party desired, to handle all internal party affairs. (J.A. 106, Marchioro Dec., ¶ 6).

[28] The term "ballot-qualified party" is used herein as shorthand for a party that is eligible to participate in the state-run primary and to have its nominees listed on the general election ballot with the party's affiliation.

avenue of expression if other avenues of expression remain open. In *Meyer v. Grant*, 108 S. Ct. 1886 (1988), the plaintiffs had challenged a Colorado statute that, while allowing proponents to place a state constitutional amendment on the ballot if they could obtain the signatures of 5% of the voters on an "initiative petition" within a six-month period, made it a felony to pay petition circulators. 108 S. Ct. at 1889. Colorado argued that the burden on first amendment expression was not substantial in light of the fact that other avenues of expression, such as the circulation of petitions by volunteers, remained open. This Court rejected Colorado's argument outright: "That [the statute] leaves open 'more burdensome' avenues of communication, does not relieve its burden on First Amendment expression." 108 S. Ct. at 1893 (citing *FEC v. Massachusetts Citizens For Life, Inc.*, 479 U.S. 238 (1986)).

California's independent candidacy and write-in "options" are substantially more burdensome avenues of expression than party-identified ballot access. Consequently, such options (if indeed such options *are* available to parties eligible for ballot qualification) do not relieve the burdens on parties' first amendment freedoms. "The First Amendment protects plaintiffs' right not only to advocate their cause but also to select what they believe to be the most effective means for so doing." *Meyer*, 108 S. Ct. at 1893.

Appellants claim nonetheless that the state is entitled to establish such burdensome conditions on ballot access. Appellants rely on *American Party of Texas v. White*, 415 U.S. 767, 780-81 (1974), for the proposition that "[w]hen a state chooses to conduct nominating elections for political parties and provide automatic access to and identification on the general election ballot for candidates of the parties, it may establish conditions to this privilege so long as the conditions do not invidiously discriminate among the political parties." (Op. Br. 49).[29]

[29] Appellants are correct only insofar as they concede that invidiously discriminatory conditions on ballot access are unconstitutional. In *American Party*, conditions on ballot access were upheld against that type of equal protection challenge. 415 U.S. at 780-81. This Court did not hold, however, that conditions on ballot access are not subject to attack on other constitutional grounds. Moreover, as plaintiffs argued below, section 11702 cannot withstand equal protection scrutiny because it invidiously discriminates against plaintiff central committees by depriving them of the right to endorse primary candidates without similarly burdening the rights of other political associations. (*See* DC Item 27 at 24-25).

In response to Colorado's similar argument in *Meyer* that it could impose limitations on the right to legislate by initiative because it had created that right, this Court held that a limitation even on a state-created right is unconstitutional if it "trenches upon an area in which the importance of First Amendment protections is 'at its zenith.'" 108 S. Ct. at 1894. Conditions on ballot access, likewise, are unconstitutional if they burden first amendment rights, regardless of whether the state was under any obligation to conduct nominating elections for the parties in the first place. This Court has recognized repeatedly that

> [government] may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited.

Perry v. Sindermann, 408 U.S. 593, 597 (1972). *See also Regan v. Taxation With Representation*, 461 U.S. 540, 545 (1983) ("government may not deny a benefit to a person because he exercises a constitutional right"). Even if parties have no "right" to ballot access by way of a state-run primary, the state may not condition such access on a party's relinquishment of its first amendment right to endorse a political candidate.

Accordingly, even if one were to accept appellants' inaccurate and extraordinary argument that a major party can "choose" not to be ballot-qualified,[30] the placement of a candidate's name on the ballot without party identification is not a suitable constitu-

[30] As is explained below, appellants' assertion that a major party can choose not to be ballot-qualified is inconsistent with Elections Code

tional alternative to party ballot access. An independent candidate is by definition a candidate that is not affiliated with an established party. Requiring a party-affiliated candidate to run as an independent candidate misleads voters and utterly deprives the party and its candidate of their first amendment rights to inform voters of their affiliation. The rights of voters to be informed about the candidates is likewise abridged, because, as this Court recently explained, party labels are an important piece of election information. *Tashjian*, 107 S. Ct. at 552. Moreover, limiting a party-affiliated candidate to a write-in candidacy is tantamount to denying that candidate access to the ballot. Thus, the "choice" that appellants claim is available to the parties is a choice among substantial, unpalatable limitations on their first amendment rights.

Furthermore, the notion that parties have "chosen" to subject themselves to the challenged regulations is incorrect.[31] The Elections Code provides no means for a party to renounce voluntarily its ballot-qualified status and remain intact.[32] As long as *one percent* of the number of voters at the preceding gubernatorial election affiliate with the party on their voter registration forms, the party remains ballot-qualified. Cal. Elec. Code § 6430(b).

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provisions allowing parties consisting of as little as one percent of registered voters to remain ballot-qualified.

[31] California's Elections Code does not contemplate that parties will choose between two different routes, one regulated and the other not, to the general election ballot. Rather, the code refers to appellants' "non-ballot-qualified parties" as "political bodies," reserving the terminology "political party" for groups that have qualified for ballot access. *See* Cal. Elec. Code §§ 9950-9956. Once an organization satisfies a threshold requirement for becoming a "political party," statutory bylaws, which may or may not resemble the organization's existing bylaws, are enacted or must be "chosen" to govern the party thereafter. The option of qualifying a candidate for the ballot as an independent is intended, obviously and literally, for candidates who are independent of any political party, rather than as a means for political parties to avoid regulation.

[32] Appellants make the startling argument that the parties can *disband* to protect their first amendment right to freely *associate*. (Op. Br. 40).

Alternatively, if at least one candidate chooses to register for the primary election, with or without party sanction, and receives at least two percent of the vote for any statewide office, the party remains ballot-qualified. Cal. Elec. Code § 6430(a). Finally, section 6430(c) allows a party to qualify for the ballot by petition. Given the vast numbers of voters registered in California as Democrats or Republicans, it is unrealistic to suggest that either the Democratic or the Republican Party could fall below the one percent threshold conferring ballot-qualified status in the foreseeable future. Nor is it likely that a majority of their members would want them to, given the heavy additional burdens facing nonqualified political associations, which must promote "independent" or write-in candidates.

By any standard, California has substantially infringed plaintiffs' first amendment rights in depriving central committees of the right to endorse candidates in primary elections. This Court has made it clear that "legislative restrictions on advocacy of the election or defeat of political candidates are wholly at odds with the guarantees of the First Amendment." *Meyer*, 108 S. Ct. at 1895; *Buckley*, 424 U.S. at 50. Sections 11702 and 29430 of the California Elections Code restrict such advocacy more completely than any other statute this Court has yet analyzed.

B. Appellants Cannot Satisfy Their Burden of Demonstrating that the Ban Is Justified by a Compelling State Interest

Because the ban on primary endorsements constitutes a significant encroachment on plaintiffs' first amendment rights, "the State may prevail only upon showing a subordinating interest which is compelling." *Bates*, 361 U.S. at 524. The statute must survive exacting scrutiny. *Elrod v. Burns*, 427 U.S. 347, 362 (1976); *Buckley*, 424 U.S. at 64-65. In order to justify such an encroachment, the state must advance an interest that is "paramount, one of vital importance, and the burden is on the government to show the existence of such an interest." *Elrod*, 427 U.S. at 362. The state bears the further burden of demonstrating that "the regulation is a precisely drawn means of serving" this compelling interest. *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530, 540 (1980). "Precision of regulation must be the touchstone in an area so closely touching our most

precious freedoms." *Kusper*, 414 U.S. at 59 (quoting *NAACP v. Button*, 371 U.S. at 438). In sum, the restriction

> must further some vital government end by a means that is least restrictive of [first amendment freedoms] in achieving that end, and the benefit gained must outweigh the loss of constitutionally protected rights.

Elrod, 427 U.S. at 363.

Appellants allude to two governmental interests that they apparently contend may justify the ban on primary endorsements: (1) California's interest in the stability of its governmental system; and (2) its interest in avoiding voter confusion. The assertion of such interests is undermined, however, by the state's failure to ban endorsements by any group other than the official governing bodies of the parties. The political parties are the only groups in California that cannot endorse primary candidates. The political parties are the only groups in California that cannot send out mailers advocating election of a slate of candidates. The political parties are the only groups in California that cannot embark on a telephone campaign to promote a primary candidate's nomination. The political parties are the only groups that cannot canvass door-to-door in support of primary candidates. Under these circumstances, appellants cannot argue credibly that the challenged ban on primary endorsements serves any state interest. There is simply no justification for this complete deprivation of plaintiffs' first amendment rights.

1. The State's Interest in the "Stability of Its Governmental System" Is Not Threatened by Primary Endorsements and Cannot Justify an Outright Ban on Such Political Speech

Appellants argue that "the primary election system" as it exists in California "promotes the state's interest in the stability of its governmental system . . . ." (Op. Br. 43). Stability is fostered via the creation of so-called "umbrella parties." (Op. Br. 42). However, appellants do not explain specifically how the ban on primary endorsements promotes governmental stability, nor could they. California survived without such a ban, its governmental

system intact, through 1963. As commentators have noted, California is *the only state* with such a ban in force today.[33]

The record is replete with evidence that political parties' issuance of primary endorsements destabilizes neither the parties nor the government. In Minnesota, the Democratic Farmer-Labor Party

> has regularly endorsed candidates running in the state's primaries since the party's inception shortly after World War II, including candidates seeking the offices of United States Senator, Governor, Attorney General, State Treasurer, and State Auditor.

(J.A. 85, Fraser Dec., ¶ 6). In the State of Washington, the King County Democratic Central Committee likewise has issued primary endorsements of candidates for the offices of United States Senator, United States Representative, Governor, State Legislator, and County Councilor. (J.A. 105, Marchioro Dec., ¶ 3). State political parties also endorse candidates in their own primary elections in Illinois, Delaware, Connecticut, New Mexico, New York, and Massachusetts. (J.A. 96, Jewell Dec., ¶¶ 9-10). Yet, none of these states has suffered a resulting destabilization of its governmental system.

The state has an interest in preserving orderly general elections and a closely circumscribed, derivative interest in pre-election resolution of intraparty disputes. *See Storer v. Brown*, 415 U.S. 724, 736 (1974). The state interest recognized by this Court in *Storer* does not, however, extend to the "internal steps [taken by the parties] affecting their own process for the selection of candidates." *Tashjian*, 107 S. Ct. at 554.

In *Storer*, this Court upheld a provision of the California Elections Code that denied ballot position to independent candidates who had been affiliated with a political party within the past twelve months. Recognizing that "splintered parties and unrestrained factionalism may do significant damage to the fabric of government," 415 U.S. at 736, this Court held that the general election ballot was not the appropriate forum for the resolution of

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[33] *See supra* note 7.

intraparty disputes. Intraparty disputes were more appropriately resolved *during the parties' nomination processes*: "The State's general policy is to have contending forces within the party *employ the primary campaign and primary election to finally settle their differences*. The general election ballot is reserved for major struggles; it is not a forum for continuing intraparty feuds." 415 U.S. at 735 (emphasis added). Thus, this Court has recognized the primary campaign and primary election as appropriate forums for the resolution of intraparty feuds. As the Court of Appeals correctly observed, "a state's interest is in orderly elections, not orderly parties, and it may regulate political parties only as an incident to regulating elections." (I App. 40a). Nothing in *Storer* suggests that a state may preempt intraparty feuding that does not threaten the state's ability to conduct orderly general elections.[34]

The state's claimed interest in promoting political stability and in tempering "unrestrained factionalism," under *Storer*, may justify channeling political competition into a particular forum, but not suppressing or prohibiting political competition. Where state statutes have the effect of suppressing political competition, this Court has found that first amendment interests outweigh the state's interest in political stability. In *Anderson v. Celebrezze*, 460 U.S. 780 (1983), for example, this Court found that Ohio had no right to enforce its conditions on ballot access to prevent a former Republican presidential contender, John Anderson, from running as an independent. "Political competition that draws resources away from the major parties cannot, for that reason alone, be condemned as 'unrestrained factionalism.'" 460 U.S. at 803. Neither can primary endorsements be condemned as "unrestrained factionalism," especially since the primary election has been set up as the appropriate forum for the resolution of intraparty conflicts. *See Storer*, 415 U.S. at 735. "Competition in

[34] Restoration of plaintiffs' first amendment rights to issue primary endorsements would facilitate the process of reaching party consensus, rather than endangering it. Political parties provide "an organizational forum in which conflict can be expressed and resolved peacefully so that common purposes can be more effectively pursued." (Add. 20a, Supp. Costantini Dec., ¶ 9).

ideas and governmental policies is at the core of our electoral process and of the First Amendment freedoms." *Williams v. Rhodes*, 393 U.S. 23, 32 (1968).

In any case, the interest asserted by appellants in fostering so-called "umbrella parties" that promote a "symbiotic relationship between ballot-qualified political parties and the state" (Op. Br. 44) has never been recognized by this Court as legitimate, much less compelling. Appellants' argument that ballot-qualified parties

> *intentionally forgo control of their own identity* in order to become vehicles for running a stable and democratic California governmental system [and that the] *California electoral system is designed to produce such parties* for just that purpose

(Op. Br. 38 (emphasis added)) is completely untrue and utterly repugnant to the First Amendment. Appellants' related argument that ballot-qualified parties, by virtue of being regulated by the state, become inextricably aligned with the state, is circular and anti-constitutional. The Constitution's protections would mean nothing if they were not applicable to protect entities that have been subjected to government regulation. As to the promotion of "umbrella" parties, the notion that the state can use its regulatory power over elections to manipulate the parties' political ideology might be appropriate in a totalitarian regime, but never in a democratic system like our own, which values individual thought and expression.

This Court recently rejected a similar attempt by Connecticut to influence the content of a political party's ideology in *Tashjian*. Connecticut had taken the position that the integrity of the parties and of the electoral system would be destroyed if the parties *did not* maintain their ideological purity. 107 S. Ct. at 552-53. To preserve the distinctions between the parties, Connecticut required that the parties hold closed primaries so that they not become "amorphous." 107 S. Ct. at 551. The Republican Party, however, wished to open its primary to independent voters.

This Court held that Connecticut could neither act as guarantor of the party's integrity, nor protect the party from internal disruption. 107 S. Ct. at 553-54. The question was not "whether

the state legislature was acting wisely in enacting the closed primary system in 1955, [n]or whether the Republican Party makes a mistake in seeking to depart from the practice of the past 30 years." 107 S. Ct. at 553 (footnote omitted). Right or wrong, the Constitution relegates to the party the "determination of the boundaries of its own association, and of the structure which best allows it to pursue its political goals . . . ." 107 S. Ct. at 554. Just as Connecticut had no legitimate interest in maintaining the ideological purity of the Republican Party, California has no legitimate interest in promoting ideologically diffuse "umbrella" parties.

Appellants further claim that the state's interest in limiting each voter to a single nominating act—another aspect of its interest in orderly elections—is served by the ban on primary endorsements. (Op. Br. 46-47). Appellants thereby fail to distinguish between the nominating act—the vote each registered voter may cast at the primary election—and speech that may influence voters' performance of that act. Appellants also fail to explain why, if their contention is to be taken seriously, California law permits all groups *except the party state conventions and central committees* to issue endorsements. If an endorsement were to be construed as a nominating act, then all the groups and individuals who currently endorse candidates and slates of candidates have violated the "single nominating act" principle. Even appellants do not go so far as to suggest that the state could validly ban all discussion of primary candidates. Any interest in limiting each voter to a single nominating act clearly cannot justify statutes limiting discussion of candidates' qualifications and political positions.

2. The Ban on Primary Endorsements Frustrates the State's Asserted Interest in Protecting Voters from Confusion

Appellants next contend that the state's interest in minimizing voter confusion justifies its ban on primary endorsements. (Op. Br. 45). Essentially, appellants claim that sheltering voters from the views of party leadership will lessen their confusion. Appellants have made no factual showing in support of any such claim. In fact, the factual showing in this record establishes the contrary.

In the past, depriving the voters of this information has demonstrably frustrated the state's interest in minimizing voter confusion. Eliminating central committees from the debate has allowed well-heeled imposters to sneak off with Democratic Party nominations. For example, in 1980, Tom Metzger, a Grand Dragon of the Ku Klux Klan, captured the Democratic nomination for Congress in the San Diego area, even though he stood for policies abhorrent to the Democratic Party and its members. (Add. 15a, Costantini Dec., ¶ 2).

Strangely, all groups other than party state conventions and central committees remain free to endorse, support, or oppose candidates in the primary elections.[35] Yet, it was the confusion generated by the slate card mailers produced by such groups, mailers using the "Democratic" and "Republican" appellations, that led to the enactment of section 11702's predecessor in 1963. *See* Cal. Elec. Code § 11701(3). Such mailers have misled voters in the past into believing that the official party organizations were supporting candidates. (Add. 5a, Christman Dec., ¶ 10). The central committees could limit the confusion if they were permitted to endorse. (Add. 16a, Costantini Dec., ¶ 5; Add. 49a-50a, Post Dec., ¶ 10). Recognizing that such a change would reduce voter confusion, a recent staff report of the California Fair Political Practices Commission recommended that the commission "[a]llow party endorsements in primary campaigns so as to offset the 'growing power' of slate mailings." (DC Item 46, Costantini Dec., Exh. B, at 55). Furthermore, an endorsement by a party central committee is a uniquely valuable piece of information, more dependable than the endorsement of any individual or

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[35] The fact that the California statute discriminates on its face among organizations wishing to exercise fundamental first amendment rights provides an additional ground for finding it unconstitutional. *See Police Department of Chicago v. Mosley*, 408 U.S. 92, 99 (1972). Section 11702 also interferes with the first amendment right of association. *See Citizens Against Rent Control*, 454 U.S. at 296 (imposing limitations "on individuals wishing to band together to advance their views on a ballot measure, while placing none on individuals acting alone, is clearly a restraint on the right of association").

single-issue group. (J.A. 125, Burns Dec., ¶ 12; J.A. 101-02, Lee Dec., ¶ 11).

This Court has repeatedly recognized that "[a] State's claim that it is enhancing the ability of its citizenry to make wise decisions by restricting the flow of information to them must be viewed with some skepticism." *Tashjian*, 107 S. Ct. at 552; *Anderson*, 460 U.S. at 798. The First Amendment disfavors "the 'highly paternalistic approach' of statutes [like section 11702] which restrict what the people may hear." *Bellotti*, 435 U.S. at 791 n.31 (quoting *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976)). As in *Tashjian*: "The state statute is said to decrease voter confusion, yet it deprives [party] members of the opportunity to inform themselves as to the level of support for the Party's candidates among a critical group of electors." 107 S. Ct. at 552. This Court's cases "reflect a greater faith in the ability of individual voters to inform themselves about campaign issues." *Tashjian*, 107 S. Ct. at 552 (quoting *Anderson*, 460 U.S. at 797).

To the extent that appellants' argument rests on an interest in preventing the central committees from having a disproportionate influence over the outcome of primary elections, it is similarly ill-conceived. "[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . . ." *Buckley*, 424 U.S. at 48-49; *Meyer*, 108 S. Ct. at 1894 n.7; *Bellotti*, 435 U.S. at 790-91.

Because "[d]emocracy depends on a well-informed electorate, not a citizenry legislatively limited in its ability to discuss and debate candidates and issues," *Buckley*, 424 U.S. at 49 n.55, the ban on the central committees' issuance of primary endorsements should be ruled unconstitutional under the First and Fourteenth Amendments.[36]

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[36] The First Amendment's requirement that Congress "make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble," is made applicable to the states by the Fourteenth Amendment. *Williams*, 393 U.S. at 30-31; *Thornhill v. Alabama*, 310 U.S. 88, 95 (1940).

II

CALIFORNIA'S REGULATION OF THE MEMBERSHIP OF THE STATE CENTRAL COMMITTEES AND THE TERM OF PARTY CHAIRS VIOLATES PLAINTIFFS' RIGHT TO FREE ASSOCIATION

In a democracy, the people are sovereign. To carry out the duties implicit in that principle, the people must be free to form associations for the discussion and promulgation of their ideas and for the recruitment and support of candidates who will represent those ideas in public office. Political parties, freely created by the people themselves, are such associations. They are vehicles developed and employed by the people in a democratic system of government to meet their responsibilities of citizenship. It is, therefore, essential that political parties be free of unnecessary governmental control. The excessive state regulation imposed upon California political parties strikes at the core of our democratic form of government.

The Constitution recognizes that "the right of individuals to associate for the advancement of political beliefs" is fundamental. *Williams*, 393 U.S. at 30. "The freedom of association protected by the First and Fourteenth Amendments includes partisan political organization." *Tashjian*, 107 S. Ct. at 548. This freedom of association prevents the state from interfering with a political party's internal structure and organization. *See Democratic Party of United States v. Wisconsin*, 450 U.S. 107 (1981) (Wisconsin not entitled to control the process of selecting the Wisconsin delegates to the Democratic National Convention); *Cousins v. Wigoda*, 419 U.S. 477 (1975) (National Democratic Party's freedom of association prevents state from controlling who may sit as the Illinois delegation in National Convention).

California's attempt to take control of the parties' internal affairs is a pernicious invasion of its citizens' rights of free choice and self-governance, which are at the heart of our democracy. The state's extensive regulations interfere with each "Party's determination . . . of the structure which best allows it to pursue its political goals," a determination that is "protected by the Constitution." *Tashjian*, 107 S. Ct. at 554. *See also Ripon*

Society, Inc. v. National Republican Party, 525 F.2d 567, 585 (D.C. Cir. 1975) (*en banc*) ("there must be a right not only to form political associations but to organize and direct them in the way that will make them most effective"), *cert. denied*, 424 U.S. 933 (1976). The rights of the parties and their adherents are thereby abridged: "Any interference with the freedom of a party is simultaneously an interference with the freedom of its adherents." *Tashjian*, 107 S. Ct. at 549 (quoting *Sweezy*, 354 U.S. at 250).

A. Laws Dictating the Membership and Leadership of Parties' Central Committees Substantially Burden Plaintiffs' First Amendment Rights

California subjects political parties to a detailed and complicated scheme of regulation. Provisions of the Elections Code dictate the size of the party state central committees, Cal. Elec. Code §§ 8660-61, 8663, 9160-64; apportion the seats on those committees between active party members and elected officials, *id.*; fix the method of selection of the members of those committees, Cal. Elec. Code §§ 8664-65; set up the procedure for removal of members, Cal. Elec. Code § 8667; provide for the filling of vacancies, Cal. Elec. Code § 8669; and limit the party chair to a single, non-renewable term, requiring that the chair rotate between northern and southern California. Cal. Elec. Code §§ 9274, 9816. In the case of the Republican and Libertarian Parties, the length of that term is statutorily limited to two years. *Id.*

This intensive regulation of the parties' internal structures has had a debilitating effect on California's political parties. The plight of fledgling parties—those most in danger of being regulated out of existence—is illustrated by the experience of plaintiff Libertarian Party. When it became ballot-qualified, the Libertarian Party did not have representatives in the legislature who could enact the party's existing bylaws.[37] Instead, the party was required to be governed by the bylaws of one of the other ballot-

[37] The fallacy of appellants' argument that the *parties* have caused their bylaws to be enacted (Op. Br. 47) is most apparent when the needs of minor political parties are addressed. Clearly, there is a difference between a political party and a state legislative body even in the case of the major political parties. The difference is inescapable in the case of minor parties that do not have representatives in the legislature.

qualified parties. Consequently, the Libertarian Party was forced to adopt the bylaws governing the Peace and Freedom Party. (Add. 26a, Gingell Dec., ¶¶ 5-6). The new bylaws forced the Libertarian Party to establish a totally new statewide organization that differs from its preferred and natural structure, organizing by county, rather than by region. (*Id.*)

Likewise, Republicans and Democrats have been saddled with unrepresentative state central committees. Although the members of the *county* central committees are elected by the general party membership to represent their views on party matters, Cal. Elec. Code §§ 8820-8823.5, 9320-9323, the members of the *state* central committee are fixed by statute. Cal. Elec. Code §§ 8660, 9160. The statutory formulae for both the Republican and the Democratic state central committees guarantee that the county representatives will be underrepresented by comparison to elected officials and nominees for elective office. (J.A. 115-16, Sturrock Dec., ¶ 9; Add. 12a, Coffey Dec., ¶ 7). In the case of the Republican Party, about three-fourths of the state committee members are elected officials, party nominees, and their appointees. (J.A. 115-16, *id.*) The legislature has thus skewed the composition of the state central committees in favor of elected officials and party nominees, which has very serious consequences for party members' rights of self-governance. As Professor Tribe notes,

> [f]ew prospects are so antithetical to the notion of rule by the people as that of a temporary majority entrenching itself by cleverly manipulating the system through which the voters, in theory, can register their dissatisfaction by choosing new leadership.[38]

As incumbents legislatively entrench themselves in the party leadership, the parties become rigid and fossilized. As Professor Weisburd explains, "requiring a particular form of party organization can prevent party adherents from attaining objectives incon-

[38] L. Tribe, *American Constitutional Law* 1097 (2d ed. 1988).

sistent with that required form of organization."[39] For example, the underrepresentation of county central committee members on the state central committees attenuates the relationship between party leadership and ordinary party adherents. Because the rank-and-file's elected representatives have relatively little power over the formulation of party policy, rank-and-file input is suppressed and diluted. Grass roots workers who do not seek their own election are thereby discouraged because the party becomes truly the property of the elected officials and party nominees. (*See generally* J.A. 123, Burns Dec., ¶¶ 6-7). This constitutes a substantial burden on the associational rights of both the parties and their members.

The Elections Code limitation of Republican and Libertarian State Central Committee chairs to a single two-year term further burdens plaintiffs' associational rights. A two-year period is hardly enough time for the chairs to become familiar with the powers of their office. It is also not enough time for the chairs to formulate, much less implement, their own programs and policies. As noted by the District Court, the parties are "gravely weakened if the members are not permitted to make use of the services of an able leader for a long enough period of time to ensure effective administration." (II App. a-60). Even if a chair is able to overcome these procedural hurdles and begin acting as a capable and effective leader, the party has no choice but to retire that person at the end of two years, regardless of the wishes of the party membership. As the Court of Appeals found, "the legislature has impaired the parties' ability to commit their fortunes to experienced and successful leadership." (II App. a-25).

As with the ban on primary endorsements, party bylaws incorporated the challenged provisions only because the law required them to do so. (Add. 51a, Post Dec., ¶ 14; Add. 59a, Romero Dec., ¶ 9; J.A. 116-17, Sturrock Dec., ¶ 12).[40] Since the issuance

[39] Weisburd, *supra* note 7, at 260.

[40] Violation of the challenged provisions is punishable *criminally* "by fine not exceeding one thousand dollars ($1,000) or by *imprisonment* in the state prison for 16 months or two or three years, or by both." Cal. Elec. Code § 29102 (emphasis added).

of mandate, both the Democratic Party and the Republican Party have amended their bylaws. As anticipated, the Democratic Party has adopted amendments to the party bylaws relating to internal party governance. (*See* Add. 65a, Supp. Kelly Dec., ¶ 6). Similarly, the Republican Party recently adopted amendments to its bylaws that make substantial changes in the composition of the state central committee. (Add. 74a, Bell Dec., ¶ 9).

Until the issuance of mandate, the state had foreclosed this kind of ongoing reevaluation and revision of the parties' bylaws. By thus depriving the parties of the flexibility to adopt bylaws suited to their developing needs and goals, California's Elections Code substantially infringed plaintiffs' first amendment rights of political association and expression.

B. California's Regulation of the Composition and Leadership of the State Central Committees Is Not Justified by a Compelling State Interest

The interests advanced by appellants in support of the state's regulation of parties' internal structure amount to little more than the rank paternalism rejected by this Court in *Tashjian*. Statutorily dictating the composition of a state central committee, according to appellants, promotes the state's "interest in the 'democratic management of the political party's internal affairs.'" (Op. Br. 43).[41] Statutorily limiting committee chairs to a single two-year term, and requiring that the chair rotate each term between northern and southern California, "assures that the rotational system will occur with sufficient regularity to prevent regional friction from reaching a 'critical mass.'" (Op. Br. 48). The well-being of the party, however, is none of the state's business. *Tashjian*, 107 S. Ct. at 554.

Legislative enactment of party bylaws is necessary, according to appellants, to "mitigate[ ] potential divisiveness within the state central committee which could interfere with its role in uniting

[41] Appellants also suggest that statutorily dictating parties' bylaws "enables the party and its membership to enforce the by-laws in state court." (Op. Br. 47). However, they do not explain how judicial enforcement advances any compelling state interest.

the party for the general election." (Op. Br. 47). However, the state has no cognizable interest in the unification of the party, because it has no interest in preventing a party "from undertaking a course of conduct destructive of its own interests." *Tashjian*, 107 S. Ct. at 554. As discussed above, in argument section I.B.1, the state's interest in averting factionalism extends only to the point of keeping continuing intraparty feuds off the general election ballot. As this Court noted in *Tashjian*, the protection upheld in *Storer* was "undertaken to prevent the disruption of the political parties from without, and not, as in this case, to prevent the parties from taking internal steps affecting their own process for the selection of candidates." 107 S. Ct. at 553-54.

This constitutional recognition of a political party's right to govern itself similarly limits the nature of the proposed state interest in "democratic management of a political party's internal affairs." This Court has never held that the state has an interest in managing internal party affairs.[42] *See generally Democratic Party of United States v. Wisconsin*, 450 U.S. at 124. *See also Ripon Society, Inc.*, 525 F.2d 567 (rejecting challenge to Republican National Party's formula for allocating delegates at its national convention). *American Party of Texas v. White*, 415 U.S. 767 (1974), relied upon by appellants, did not purport to recognize such an interest. In that case, this Court simply noted that "the party nominating convention process is unrelated to ballot qualification and corresponds more to the democratic management of the political party's internal affairs." 415 U.S. at 783 n.15.

Furthermore, appellants have utterly failed to demonstrate that the challenged regulations in any way promote party democracy. It is instructive to note the absence of federal legislation specifying who shall be a member of any of the national committees, or who shall be designated a delegate to the national party conventions. These matters are left to the discretion of the national parties to decide for themselves without governmental interfer-

[42] It is not true, nor is it asserted, that this is a case where state regulation is necessary to prevent the derogation of the constitutional or civil rights of party adherents. *See, e.g., Smith v. Allwright*, 321 U.S. 649 (1944).

ence. The absence of such regulation on a national level, where the impact of intraparty feuds would theoretically be greater, seriously undermines appellants' claims that the state has a legitimate, much less compelling, interest in mandating the selection procedures and terms of office for analogous party organizations at the state level.

Moreover, the parties' strong motivation to achieve electoral success represents a sufficient answer to the specter of "factionalism" and disunity raised by appellants. Each party is entitled to decide what level of internal discord enhances party vitality (Add. 21a, Supp. Costantini Dec., ¶ 10), *see Tashjian*, 107 S. Ct. at 554, and is appropriate to its function as "an organizational forum in which conflict can be expressed and resolved peacefully so that common purposes can be more effectively pursued." (Add. 20a, Supp. Costantini Dec., ¶ 9). *See also* Rotunda, *Constitutional and Statutory Restrictions on Political Parties in the Wake of Cousins v. Wigoda*, 53 Tex. L. Rev. 935, 937 (1975). (*See also* Add. 20a-21a, Supp. Costantini Dec., ¶¶ 9-11).

The statutes governing the terms of party chairs similarly cannot withstand the exacting scrutiny to which they must be subject under the First Amendment. Appellants would justify these statutes with respect to "the interests of avoiding sectional identification of the party and unnecessary conflict within the committee which could impede its role of unifying the party for the general election." (Op. Br. 48). However, the state has no legitimate interest in seeing that a party avoids sectional identification or is unified for the general election. Again, the state is attempting to "substitute its own judgment for that of the Party." *Tashjian*, 107 S. Ct. at 554. If a party finds that failing to rotate the chair between northern and southern California every two years impedes its effectiveness, the party can fashion its own solution to the problem.

> The Party's determination of the boundaries of its own association, and of the structure which best allows it to pursue its political goals, is protected by the Constitution.

Id. The state cannot interfere with a party's internal governance on the pretense of protecting the party against itself. Accordingly, appellants have not carried their burden of demonstrating that the challenged provisions "further some vital government end by a means that is least restrictive[43] of freedom of belief and association." *Elrod*, 427 U.S. at 363 (footnote added).

[43] The Elections Code attaches *criminal penalties* to the violation of these laws. Cal. Elec. Code § 29102.

CONCLUSION

For the foregoing reasons, and because the state may not interfere with political parties' paramount rights of political expression and political association absent a compelling justification, plaintiffs respectfully request that the decision of the Court of Appeals be affirmed.

Dated: September 1, 1988

Respectfully submitted,

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